

Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 23 November 2016

10.25 am

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Hunt of Wirral; Lord Judge; Lord MacLennan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 4

Heard in Public

Questions 49 - 75

Witnesses

[I](#): Daniel Greenberg, former Parliamentary Counsel.

[II](#): Michael Clancy OBE, Law Society of Scotland, Robert Khan, Director of Public Affairs, Law Society of England and Wales, and Andrew Walker QC, Vice Chairman-Elect of the Bar Council and the Vice Chairman of the Bar Council Law Reform Committee.

[III](#): Sir Stephen Laws, former First Parliamentary Counsel.

Examination of witness

Daniel Greenberg.

Q49 **The Chairman:** Welcome to the Committee, Mr Greenberg. As colleagues will have seen from your biography, to say that you are deeply versed in the legislative process is an understatement. We are very grateful to have you here, and we have a number of questions to put to you.

The Office of the Parliamentary Counsel has given a description of “good law”, with which I think you are probably familiar. They say it is “necessary; clear; coherent; effective; and accessible”. Do you think that is accurate in general at present, at the point at which it reaches Parliament?

Daniel Greenberg: I popped into your Printed Paper Office the other day to pick up three Bills, pretty much at random, to see what the answer to that question was likely to be. The Policing and Crime Bill, which at 361 fairly packed pages is clearly too big for you to scrutinise properly, is largely referential legislation, which makes it very obscure. It contains, just in case 360 pages were not enough, one of those wonderful new powers for the Secretary of State to go off by regulations and do anything that he thinks appropriate in consequence of the Act, including repealing and revoking primary and subordinate legislation—so there are a few more pages to come. It makes it very difficult for you to scrutinise if you do not know what it will look like when he has finished doing things. As I flicked through, I found a lot of very long sentences. We are looking for clear and coherent legislation, but a lot of sentences were more than 100 words long. That should not be happening today and I cannot see the point of it. It is not very clear and not very coherent.

That is a big Bill. It is very difficult because drafters are under a lot of constraints and they have to produce pages and pages of stuff, so what about a really nice tight small one such as the Small Charitable Donations and Childcare Payments Bill? Is it clear and coherent? The first proposition: “In section 2 ... in subsection (1) for the words from ‘if—’ to the end substitute ‘if it is not an excluded charity for that tax year (see subsection (3))’”. There is no real chance that you or other readers have the foggiest idea what is going on. There is no reason why it could not be introduced with some kind of explanation. Is there an attempt to make it clear and coherent? No.

Then there is the National Citizen Service Bill. Legislation will be necessary. What does it do? It sets up a body corporate with the following primary functions “to provide or arrange for the provision of programmes for young people ... for the purpose of ... enabling participants of different ...”. If you want to do it, just do it. You do not need a Bill. I cannot find a legislative proposition in that Bill. I cannot see anything that needs to be done by legislation that cannot be done in other ways.

I have not found evidence that the necessary, clear and coherent criteria are being applied in a rigorous way to the legislation that comes to your House. It seems to me that they may be targets or aims for the Government, but I cannot see evidence of rigorous application.

As for whether they are effective, you do not know and you will not know, because you do not properly benchmark. When you have Committee, you do not take assurances from a Minister, benchmark them, note them down and say, "Right, this is what it is going to do and is meant to do". You do not come back in a year's time, have post-legislative scrutiny as an absolutely regular thing, going through line by line the assurances you were given in Committee and bringing in expert evidence from the victims of the legislation to run with it—the stakeholders: "Was this assurance backed up? Did this happen? What does the Minister say? If it did not happen, we have a sunset clause to get rid of it because it was not in fact justified". There is no evidence of a mechanism for determining whether or not it is effective.

Is it accessible? This is not the day to deal with that, but, as you know, the United Kingdom has an appalling record on accessibility of legislation for citizens. Most countries provide free online updated databases of legislation. I declare an interest, because I am an editor of a commercial database. For those who can afford a commercial database it is fine, but the citizen does not have access to a fully updated database. The legislation.gov.uk website is not fully up to date for primary legislation, and for secondary legislation it is fair to say that it has not even set itself the target of becoming fully up to date. On accessibility, we have a very poor and worrying story to tell for a country that is a rule-of-law democracy.

The Chairman: Thank you. That is an encouraging scene setter. Let us try to break into the various subsidiary clauses.

Q50 **Lord Morgan:** They are profound and serious criticisms. You have had long experience in this area. Do you think that things have got worse? Was there more clarity and effectiveness in legislation 10 or 20 years ago?

Daniel Greenberg: I need to declare an interest there as well. I was a member of the Office of the Parliamentary Counsel for 20 years and I left, so anything I say you need to take with a pinch of salt—a "This is a disgruntled former employee" sort of thing. In a way I am a bit nervous of telling you that everything has got worse. I would say that: I am not in the office now, so everything has got worse.

I do not think everything has got worse in every respect. There is a lack of evident rigour. The evidence is partly the fact that the stated aims of the Government in the "good law" project do not seem to be applied rigorously, and there is no mechanism for applying them. The other thing the Committee might like to look at is this. Under the Inco Europe rectification rule, judges have now decided that we are not going to defer to the legislative drafter and assume that he or she necessarily got it

right—that sometimes they make a mistake. That is used increasingly. I feel the judges have less deference to the form and wording of the statute than they used to. I may be wrong, but that is what I feel from reading judgments such as *Inco Europe*. I suspect that is because judges feel that they are dealing with a less quality product than they used to, but I encourage you to take all that with a pinch of salt for the reason I gave.

Lord Morgan: One of the things we experience in the Lords is that we have a very large number of what you might call portmanteau Bills, in which a number of subthemes are yoked together and then given some grandiose title. Do you think that is part of the problem?

Daniel Greenberg: I do not know whether it is a symptom or a cause, but it is certainly a very big problem. You criminalised trespass with a provision that was tucked into a Bill. I think it was brought in on Report in the second House. I might have got that slightly wrong, but it was certainly at a late stage. It is fair to say that it got no serious scrutiny because it was too late in your House for a proper vote to be held and a proper discussion to be had. You reversed a massive common law tradition pretty much as an afterthought. You could only do that because we had such a huge Bill that it could be tucked in as Clause 7,352 and nobody really could afford to notice, because you needed to get the Bill through to Royal Assent. It certainly would not have happened if it had been Clause 2 of a previously one-clause Bill.

Q51 **Lord MacGregor of Pulham Market:** To what extent are parliamentary counsel responsible for ensuring the quality of legislation, as opposed to departmental lawyers, policy officials and Ministers, or, to put it the other way round, as opposed to Ministers and departmental lawyers?

Daniel Greenberg: I compute very roughly that when you write legislation you can reckon that less than 1% of what you write will be read seriously by anybody else before enactment, and quite possibly after enactment as well. We are the front line. I am not talking only about a huge portmanteau Bill. Inevitably, our stuff is not going to be read very carefully, and many of the people who read it are not really equipped to understand what it does and does not do anyway. We always saw ourselves as the front line in maintaining the rule of law.

Lord MacGregor of Pulham Market: “We” meaning parliamentary counsel.

Daniel Greenberg: Parliamentary counsel. When I draft around the world I still see myself as responsible. Let me give you an example. Long before the human rights statement under the 1998 Act, we regarded ourselves as responsible for checking that things such as powers of entry were appropriate. If we thought they were not, if we thought they were improper, our job was to alert the Attorney-General, and the Attorney would then take it up in Cabinet Committee or potentially in Cabinet. It was our role to flag that up. Good departmental lawyers might do it themselves, but might not, not through wickedness but because that was

not their primary role. They often relied on us. In fact, sometimes we got coded instructions from really good departmental lawyers: "I am instructed to ask you to do this ridiculous thing; please reply that you are not going to". It was not in quite those words, but it was pretty obvious that that was what was going on.

We must be responsible for ensuring the quality of the legislation—we as in legislative drafters—because, if we do not, no one else is in a position to. Are we able to? Again, feel free to say this is rose-tinted spectacles and all the rest of it. When I started, we were encouraged to stand up to Ministers. Good Ministers wanted us to stand up to them. They expected us to say no if they were doing something that we thought was improper. Over the 20 years that I was in parliamentary counsel, I certainly sensed less invitation to say no to Ministers.

Lord MacGregor of Pulham Market: What sanctions, recourse or other action do parliamentary counsel have in a situation where they are very unhappy about something? We were just talking to each other, and we cannot recall an occasion as Ministers when one of these things came up to us. Where is the sanction and where is the best recourse?

Daniel Greenberg: Parliamentary counsel, in that sense, is a dog with rubber teeth, but quite often the bark can be effective. You will not get to hear about it because we will see it off at the instruction level. There will be things that Ministers are never troubled with, because we will have had a discussion at official level and said, "We are not sure that is a really good idea" and we would see it off.

You may not have seen arguments when the Attorney intervened, but other Ministers will have seen them. It did happen, and the fact that the dog had the ability to bark to the Attorney and say, "There is something here you need to look at" was taken very seriously by departmental lawyers. How often did I have to do it? Certainly no more than once or twice a year on average, and even that may make it sound a bit more often than it was. It was rare, but it was not never, by any manner of means.

Lord Hunt of Wirral: You referred to your relationship with Ministers. Those of us who used to instruct you were always told we had to do it at arm's length. I cannot ever recall during my 16 years as a Minister that I came face to face with you or one of your colleagues as parliamentary counsel. Can you remind us of all the protocols that were inserted between Ministers and parliamentary counsel?

Daniel Greenberg: There were no formal protocols. It depended greatly on the Bill, on the Minister and on the parliamentary counsel. "Often" may make it sound too frequent, but on a number of occasions I asked to see the Minister and I certainly never remember being told no.

Q52 **Lord MacLennan of Rogart:** Many aspects of a political process militate against good legislation. Could you indicate what you think are the key factors that influence the quality of the drafting of legislation?

Daniel Greenberg: Clear policy and proper training. If the policy is not clear, no drafter can produce a decent piece of legislation; and very often the policy is not clear. Our primary role in drafting legislation is to help them go back and unpick what they are really trying to do, and rewrite the instructions, in effect—clear policy.

Lord MacLennan of Rogart: Who should judge the clear policy in the department?

Daniel Greenberg: It is fine for them to leave that to parliamentary counsel. That is the role of parliamentary counsel. It is the person at the end, who actually has to write down the words, who can tell whether it is flowing right. If the policy is clear, the words just flow themselves on to the paper. When the words do not flow, it is always because I do not yet know what I am trying to write. I have no difficulty with the department leaving that to parliamentary counsel, and then parliamentary counsel come back and say, "I do not think this is clear; help me". What departments have to do is engage constructively at that stage and be prepared not to defend what they have produced. It is not personal. We are not criticising them in any sense. They have to be prepared to engage, in shared humility and constructively, in getting the policy right, and then the words flow.

Lord MacLennan of Rogart: Who in the department should take the initiative in answering questions about the unclearness?

Daniel Greenberg: The departmental lawyer, who is the conduit between the drafter and the policymakers. One of the bits of added value that a good departmental lawyer brings to the process is that they understand exactly what counsel is worried by. They get the point, and they know who to go to in the department to resolve it at policy level.

Q53 **Lord Pannick:** In many of your criticisms, you spoke of lack of clarity and verbosity. It seems to me that the real question is whether that is because of a failure by parliamentary draftsmen to do the job properly or whether the lack of clarity and the verbosity is a consequence of inadequate policy. I am interested in your experience when you were performing that role and the extent to which you were unable to get clear instructions from departments to enable you to do your job properly.

Daniel Greenberg: You almost always did. You almost always could, once you went back to them and you batted it backwards and forwards. I do not want to make it sound too extreme, but sometimes everybody knew that counsel were under huge pressure, that the policy was very difficult and that Ministers wanted huge numbers of things done in an amount of time. Occasionally, I think that is used as an excuse for not trying hard enough. I do not want to overpitch it. I am not saying that that is generally the case, but I think that on some occasions people could have done better.

Lord Pannick: You have the experience and I do not, but I would expect that, if a parliamentary draftsman at a senior level sent back a memo

that said, "You have asked me to draft whatever Bill this is and we are having difficulty because we do not actually understand", there would be political consequences and it would be taken note of. I am just interested in your experience as to whether that is right.

Daniel Greenberg: There are two things. First, I do not think there should be those consequences. As I said before, that is the way it ought to work. Things have not gone wrong when the drafter looks at something and says, "Hold on, I do not understand this". That is working right, and it is fine. That was my answer to Lord MacLennan. That is the way the balance of the work is meant to run.

As I said to Lord MacLennan, a situation when a department does not play ball properly, and is not interested in getting a good product or helping you to get a good product, is when there should be political consequences. I think there would have been political consequences had that happened to me frequently when I started. There would have been fewer, or softer, political consequences towards the end. That is something, again with all the caveats I gave before, you might want to discuss.

Q54 **Lord Norton of Louth:** What is the relationship between parliamentary counsel and the Leader of the House as chair of the Parliamentary Business and Legislation Committee? Do you think the role of the Leader could be strengthened in ensuring that Bills fulfil the various criteria you mentioned? One of the problems that was put to us by Sir Richard Mottram was that quite often big beasts in the Cabinet who outranked the Leader would try to steamroller their Bills through. Is there something more that could be done to strengthen the Leader's role?

Daniel Greenberg: The Leader needs to be a big beast. Many of the best leaders were. I remember working with Tony Newton, who was a Member of this House latterly. Many of you will remember him. He really got drafting. He got the importance of legislation. He got the rule of law. He was a very effective spokesman for us and a very effective player in committing to improving the rule of law and the quality of legislation. Other Leaders did not really get it in the same way and therefore did not do it.

What you say about the relative size of beasts in the Cabinet is certainly one of the changes you may want to look at, not only between the Leader and departmental Ministers but, for example, between the Attorney and departmental Ministers. The dynamics change, and I completely agree with the implications of your question; those dynamics are critical to ensuring that people care about the quality of legislation. If people care, it will happen; if people do not care, it will not.

Lord Norton of Louth: Do you think there is an institutional way of ensuring that? If not, you are dependent, as you imply, on the individual appointed to the office, and that a big beast is appointed. Is there anything else that could be done in a more structured or consistent way?

Daniel Greenberg: I do not think there is. I have one suggestion, but it does not come in response to your question. On your question, I think this is politics. If I do not care about the quality of legislation, I appoint a small beast as Leader of the House. If I care about it, I appoint a big beast. It is that way round. There is nothing you can do to prevent that.

The Chairman: Would you like to give us your small suggestion anyway because we are running short of time?

Daniel Greenberg: That is very kind. It is on the question of bringing in outsiders. Occasionally, there were attempts to bring in outside help to draft legislation. It did not work. A lawyer can be a fantastic lawyer, but most fantastic lawyers are not experts in legislative structure and process. At the moment, to put it as a sketch, we have a system whereby people drafting legislation know all about legislation but they do not know very much about the law that they are dealing with. We have tried bringing in people who know all about the law but do not know about legislation. That does not work very well either. You need to look for serious collaboration, and I do not just mean consultations. We are killing the cat with cream on consultations. There are billions of consultations. I do not mean very kindly allowing them to attend a Public Bill Committee in the House of Commons and being graciously allowed to say what they think. I mean involving them, a bit like an intervener status in a case.

It seems to me that you might like to think about giving intervener status in the legislative process to key stakeholders—people who are going to have to make this stuff work and live with it—and find a way to give them a place at the table so that their contributions at drafting level, policy level and enforcement level are not just one more consultation response, but are actually treated as key components of the legislative process as it takes place as you scrutinise the Bill. It is just a thought in my mind, but I think it is something you should consider.

Lord Pannick: Do parliamentary counsel talk to outsiders while they are drafting the Bill?

Daniel Greenberg: Yes, sometimes we do, but it is quite rare and it normally does not work brilliantly in my experience. It is not like when you do a Private Peer's Bill or a Private Member's Bill, where you are collaborating with the organisation behind it. They are basically lobbying and they are very cagey about what they can tell you, and you cannot tell them everything. It did not happen often, and it was never as productive as I would have liked.

The Chairman: I must interrupt. We have three questions left and we want to ask them. I am very sorry that time is so short. It is because so many witnesses have been keen to come to talk to us.

Q55 **Lord Beith:** Is your suggestion not what the Public Bill Committee is supposed to do? I recall in the first incarnation of Public Bill Committees the late Lord Mayhew saying he had taken a Bill through the Committee and had become convinced that not only did it not succeed in carrying

out its objectives but it could not even have been made to do so. That is a rare case, but is that not what should happen in the Public Bill Committee?

Daniel Greenberg: Yes, but at the moment they have the consultation bit; they take oral evidence; they let the organisations come and say their piece; and then it is, "Now we will go and do the traditional Committee" and the organisations have gone. You need to have them there in the room when you are doing your line-by-line scrutiny, so that they feed in at that level.

Lord Beith: Rather than simply passing notes up.

Daniel Greenberg: Yes, that is a joke.

Lord Beith: I have one other point. When Sir Richard Mottram gave evidence to us, he spoke of a change at about the time that he was a Permanent Secretary. Prior to that, parliamentary counsel were considered to be incredibly austere figures, to be consulted only when necessary. He spoke about the lawyers in the department being more integrated in the team and parliamentary counsel consulted at an earlier stage. Was there really so much of a change?

Daniel Greenberg: There was a bit of a change. There is less of an ivory tower. That is good, and not necessarily good. We were always approachable but with a bit of distance, because we always reminded ourselves that we were the front-line guardians of the rule of law in certain respects and, therefore, there had to be a bit of distance between us and the department. Breaking that down is not necessarily a good thing.

Lord Beith: Talking of change, do you think the role of the Attorney-General has changed over the same period in relation to this?

Daniel Greenberg: Yes.

Q56 **Lord Judge:** By whom is it decided that provision will be made in primary legislation for delegated legislation? What principles, if any, are applied to the decision?

Daniel Greenberg: The choice may be suggested by the department in the instructions. The balance may be initiated by parliamentary counsel. Quite often it is a bit of both. The parliamentary counsel now publish a manual, or a drafting manual sort of thing, which I imagine has stuff in it about the balance between primary and secondary legislation. It is really something where you get a feel with experience about what is right and what is wrong. If you look at things like the public law project case recently, you can tell that the right balance is not quite struck at the moment. That is one of the many things where, if there was real involvement of practising lawyers and stakeholders in the process, I would like to think they would not let you get away with a broad delegation of power of the kind I referred to earlier.

Lord Judge: Where will that have come from?

Daniel Greenberg: I will tell you what happens with that. It is a bit like civil penalties. You try it once in a Bill where it does not really matter because it is the only thing you can do, and you get away with it because it is appropriate then. Somebody will say, "Oh, that is a good idea. That saves us a lot of trouble. Let us do it". The problem is that you are all very precedent driven. When it has happened once, the Minister can stand up and say, "I do not know what you are making a fuss about because we did it last week", so suddenly it is, "Okay, fair enough, we cannot object to that". Then you find it has become routine. That is a provision that you might very occasionally reckon was the only sensible way to run a piece of legislation. You have now allowed it to become routine, and I think you need to think again.

The Chairman: Mr Greenberg, the time available does not do justice to your experience and your wisdom, but let me assure you that your message has come through loud and clear. Thank you very much; we are most grateful.

Examination of witnesses

Michael Clancy, Robert Khan and Andrew Walker.

Q57 The Chairman: I begin with the same apology to you. The time available does not do justice to your experience and the fact that there are three of you. We have had two written submissions from you on some of our questions, so please do not feel that you have to go through it all again. Please speak for the length that you think is appropriate to the relatively limited time available. We are very grateful to you for talking to us because your experience, both on behalf of the Law Societies and the Bar Council, will be of great value to our inquiry. Possibly, you heard the question that I asked Mr Greenberg at the outset, quoting the Office of the Parliamentary Counsel describing "good law" as law that is "necessary; clear; coherent; and accessible". Perhaps you could tell us not just your view but what your members tell you about this, and how you think we might address it. Would you like to start, Mr Khan?

Robert Khan: Thank you very much for inviting us to give evidence. I think we would absolutely agree with the definition of "good law" that parliamentary counsel provided. I will briefly trot through each of those different parts. Mr Greenberg painted a bleak picture about a lot of things, including the necessity of legislation. I agree with him in some senses that a lot of pieces of legislation are perhaps not necessary. It is interesting with private legislation that you have to demonstrate the necessity of that legislation, which you do not have to do in the public sphere.

You have discussed at previous sessions how some Bills are caused, for example, by great public controversy, which causes moral panic, which causes people to say that something must be done and which then causes suboptimal legislation. There are also knee-jerk responses, and of course there are certain pieces of legislation on the statute book that could be said to be government by press release. The Compensation Act 2006, for example, arguably did not add to the existing corpus of law.

On "clear" and "coherent", again Mr Greenberg painted a very bleak picture, but I agree with some of it. I think legislation has improved over historical time. Certainly we do not see the "herewiths" and "theretofores" that we used to see. The language is far more accessible. However, a lot of our members say that, for example, when statutory instruments amend statutory instruments it becomes very hard to follow. There are particular examples in the tax field or in the Immigration Rules. There was a recent case where Lord Justice Jackson described the rules as having now "achieved a degree of complexity which even the Byzantine Emperors would have envied", so there are certainly some issues.

Mirroring what Mr Greenberg said on effectiveness, there is certainly a role for more post-legislative scrutiny. On accessibility, I agree with Mr Greenberg that the legislation.gov website is not nearly there. I think

85% of primary legislation is now there, and it is increasing by about 1% a month. A lot more needs to be done to get it where it needs to be.

Michael Clancy: It is quite difficult to say that there are absolute rules about this. Some legislation fits those criteria and some do not. Mr Greenberg's bravura performance, with his examples, is a very good way of pointing out defects. It is rather more difficult to be able to point out virtues.

I would take the step back that the Committee began to explore toward the end of the evidence session. Policy creation is what dictates whether good law is made, in a sense. It may be all about political necessity. That is a matter of political judgment. Political coherence is a matter of political communication, or perhaps political accessibility, which might be an aspect of political vision. It is taking that step back: on what basis do the draftsmen draft what they are asked to draft?

Many of you who have been originators of policy, and the producers and advocates of the legislation that then follows, are perhaps able to tell a better story than we who are external observers. We who are external observers see a product. Of course, in a sense it is easy when you are looking at a product such as a miscellaneous provisions Bill. Lord Chairman, you and I, once upon a time, had an experience over the Law Reform (Miscellaneous Provisions) (Scotland) Bill in 1990.

The Chairman: I remember it.

Michael Clancy: You might remember it too, Lord Hunt. It is the sort of thing where we find now that, although they are not called miscellaneous provisions Bills, many Bills are in fact miscellaneous provisions Bills. It is not unexpected that the bulk of a measure may compartmentalise into several sections. For example, the Digital Economy Bill, currently being considered in the House of Commons, has provisions not only about the communications code, which provides for internet providers to be able to run wires through farmland and things like that, but about the protection of children from pornography on the internet. You can see that it is quite a difficult question to answer.

The Chairman: Is political urgency another component of the problem?

Michael Clancy: Of course, there is an issue about speed of production. I do not think it was the Kaiser who said that law reform is like sausage making; you like the result but you do not like the means of production. I do not think it is like that, but the speed of production certainly has an impact on the quality of legislation. We deal with relatively few emergency Bills in the Scottish Parliament. From the Law Society perspective, I think I have had to deal with three emergency Bills. In the UK Parliament, perhaps more time should be allowed, first, for the policy formulation process and then the policy execution process. That would be helpful. In particular, it would allow us to catch the gaps where legislation fails to capture the entire sense of the policy. That has an impact on its effectiveness.

Andrew Walker: I endorse all of that, and indeed what Daniel Greenberg said. I will not bore you by repeating it all. To give further examples of where things are not working, there are a number of powers that are not actually used by the Executive. My perception is that an increasing number of Bills are enacted into law but never brought into force. That is a classic example of suddenly realising after the event that it just does not work.

Policy clarity seems to me something that we really require. Daniel Greenberg was absolutely right about that. If the policy is clear, the drafting will be easier. It is the same as any other legal exercise. If your instructions are clear, you know where you are heading and you can perform the task much more easily. What may be missing in the process is what Daniel Greenberg said about expert involvement. When you realise that the Act is not going to work, it may be a facet of the drafting or it may be the failure of parliamentary counsel to have input from those who will have to implement it saying, "This is just not going to work. You could do it a different way, but what you cannot do is do it this way". When that happens, as it does in relation to some delegated legislation, my experience is that, if you are listened to, you can end up with a far better piece of legislation at the end of the process than you started with.

Delegated legislation is an area where accessibility is an increasing problem. What I would emphasise in relation to that is not just the problem with the government website and its availability but the ability to work out which pieces of delegated legislation are relevant. In areas such as immigration and planning, where there is policy as well, the website is changed, but you often need to know what the position was at a particular point in time, and it is impossible to do that, certainly for any member of the public.

The Chairman: As you have mentioned delegated legislation, perhaps I could bring in Lord Judge, who wishes to ask about it.

Q58 **Lord Judge:** What are the appropriate—I underline appropriate—criteria for deciding whether delegated powers should be included in primary legislation?

Andrew Walker: That is a difficult question to answer.

Lord Judge: I am sorry about that.

Andrew Walker: It is a difficult question to answer in this sense. Every area is likely to need, I suggest, a slightly different response in primary and delegated legislation. There is a general concern about Henry VIII clauses, mitigated perhaps, as Daniel Greenberg said, by judicial reluctance to apply a wider Henry VIII clause rather than a narrower one.

There should be some guidelines in relation to legislation at the point of presentation. For example, one can readily identify human rights, as Daniel Greenberg mentioned, and rule-of-law issues. One could identify certain basic criteria for things that should not be the subject of delegated legislation, certainly not without strict safeguards.

Beyond that, the answer may be for Parliament itself to pay more attention to the delegated legislation powers when they are in a draft Bill. It is not at all clear to me that a great deal of attention is given to the scope of those powers or to restrictions on those powers. My understanding is that, when delegated legislation is considered by the House, the consideration is relatively limited to, one might say, a rough assessment of whether or not the powers in the Bill are sufficient. Having seen the product of that at the end, with one piece of draft delegated legislation that has still not seen the light of day, I do not think I am convinced that the answer that came back from the House was the right answer about the scope of the powers in relation to the Bill. There is just one Committee that considers that, and the merits of delegated legislation are not given any consideration at all in substance.

Lord Beith: In your written evidence, at paragraph 12, you issue a warning that this will be writ large with the transfer of EU legislation. You say, "It is one thing to use a subordinate instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which simply emerges from ministerial decision-making". Would you like to say anything more about that?

Andrew Walker: Absolutely. Perhaps I can summarise it in this way. When we are transposing EU legislation into UK legislation, it has already been through a process of consideration, and indeed considerable negotiation, at EU level. In many cases, there is then a further process of much more careful consideration here as to how legislation should be implemented. The fourth money laundering directive is a clear example. At the moment, the Treasury is consulting. Supposedly it is an evidence-gathering exercise. The reality is that they are saying, "There are several problems with this. What do you think the answers are? How can we meet those problems?" At the moment, quite often there is a double layer, but certainly a layer of scrutiny at EU level. If we were to change—in effect, simply by ministerial fiat—legislation that at the moment is delegated legislation in the UK, there is no process of scrutiny at all for things that were seen as important enough to go through two levels of scrutiny when they were enacted in the first place.

Robert Khan: I concur with what Andrew said. I would certainly support the idea of Parliament laying down firm criteria about what should be primary and what should be secondary legislation, although we need to be mindful that there are thousands of pages of secondary legislation promulgated every year, and much of it is about putting roadworks on the M1. You would not necessarily want that higher level of scrutiny for those sorts of issues.

To give one live example, a couple of years ago the Ministry of Justice promulgated what were called damages-based agreements, which would allow solicitors to fund cases in different ways. The profession felt there were so many technical issues with the drafting that colloquially they became known as "Don't bother agreements". If there was primary

legislation and more scrutiny of higher issues of policy, it might ameliorate those sorts of issues.

Michael Clancy: Where is the dividing line? Of course, issues that would be more suited to primary legislation should not be put into delegated legislation. Those that have some element of political or legal controversy about them would perhaps be one way of assessing that. On the other hand, there are those that are technical, such as your M1 example, Robert, or changing fine levels or things like that, and perhaps even the deregulation regime. Those are perfectly well-understood examples. If we can extrapolate from those general principles, there should be no reason why we could not do that.

I take the point about how much scrutiny the provisions get. In some instances, they get a lot of scrutiny. They may come at the end of a chapter at the start of the Bill. Recently, this year, we had the Scotland Bill, which became the Scotland Act 2016, and the significant powers given to the Secretary of State to alter legislation were at the back of the Bill. The Delegated Legislation Committee here had considered those powers and had issued a memorandum criticising them quite significantly. It was not until Report in the House of Lords that the Government relented, after some pressure, and made amendments to have those provisions conform to some extent with the Deregulation Committee.

The Chairman: We share your sense of outrage about aspects of that Bill.

Michael Clancy: You know what I am on about.

The Chairman: Yes, I do.

Q59 **Lord Hunt of Wirral:** Turning to the way improvements could be made in the way legislation is drafted, how might they be achieved, bearing in mind that there has always been resistance from parliamentary counsel to any interference in the way in which they draft Bills? That is mainly concentrated on amending previous legislation. Every time you have a draft piece of legislation you have to have all the other facts around you in order to try to understand it. How are we to return to plain English, so that people can take an Act of Parliament and know what the law is because it is easy to read? Mr Khan, you have huge resources—thousands of solicitors. At the Bar, we have thousands of barristers who could have an input in trying to make legislation more intelligible. How are we going to do that?

Robert Khan: That is not a suggestion the profession would want to refuse, Lord Hunt. There are two ways we could possibly address it. The first is more draft Bills. In our experience, having more draft Bills allows us to scrutinise properly. For example, Lord Pannick will be aware of the Investigatory Powers Bill that was produced in draft. That allowed us to have much more dialogue with the Bill team. Because it is published as a

draft there is less ministerial pride in making changes. We got significant changes to that legislation that were very much in the public interest.

A more technical response might be Keeling schedules. We are all aware, of course, that you would not want a Keeling schedule for minor amendments to a very big Bill, but for Bills that cause a lot of amendments to previous bits of legislation, why not publish the Keeling schedule with the legislation? They must exist; I am sure parliamentary counsel must have informal Keeling schedules on their walls as they try to work out legislation, otherwise how would they ever do it? It might be good to have more public scrutiny of them.

Michael Clancy: I am intrigued by the idea of the public having more access to legislation and being able to read it easily. Robert's quote about Byzantine lawmaking reminds me of the Emperor Justinian, who was devoted to codification. That could give us a route to rethinking how to consider law that might be more accessible, more easily managed and more easily read. There could certainly be consolidation; anyone who knows that I can drone on for hours about codification knows where I stand on that.

The process of consultation that precedes any legislation should aim to meet the standards of legislation that this Committee and others, such as the Constitution Unit and the Bingham Centre for the rule of law, have expressed as desirable: simplicity, using language that people can understand and getting rid of foreign language terms. I refer to some of the work that the Scottish Government parliamentary counsel's unit has produced in its latest guidance on the production of Bills. It goes into some detail about the kinds of expressions that ought to be used; not "shall" but "must" and no Latin. Ex facie, that is a good idea.

The Chairman: Interesting. We will pause there.

Andrew Walker: Lord Hunt, with respect, hit the nail on the head. If you want to achieve that change, you would not start from where we are now. There is little one can do about all the legislation that is on the statute book unless Parliament will take the time and civil servants will be provided to do the drafting and a much more comprehensive consolidation exercise.

In real terms, practically speaking, I suspect that sort of exercise will be limited to areas where it is pressing. The Committee heard about immigration law last week. At the moment, another area the Law Commission is looking at is sentencing, which is a disgrace and a pressing need. If we achieve the position, where there is a pressing need, of getting a new statute that replaces everything that was there before, we start from a better place when we go forward. Amendments to that can be seen to be much more transparent. You can understand them much more easily and you can make sure that they actually work.

I have some additional suggestions. There is not enough parliamentary control over the quality of legislation, and Parliament itself ought to have

some system both for primary and delegated legislation, put in simple terms of a red card and a yellow card. With a yellow card it gets sent back for reconsideration, and red is, "We will not take this. It simply does not comply with what we require in order to be able to consult on it and work out whether it is going to work".

The other thing I would add, again going back to Daniel Greenberg's suggestion, is expert involvement. One used to have a Green Paper, where we would get involvement on consultation. With a White Paper, there is a proper explanation of policy, a draft Bill that seeks to implement that policy and the scope for structured expert input from those who are going to have to work with it, both those implementing it in practice and the lawyers—possibly not the judges for constitutional reasons—who will have to apply it in a court of law if there is a dispute. There is then the opportunity for someone to say, "Well, the policy may be right or wrong, but, even if that is the policy, that is not the way to do the implementation of the policy". As was said earlier, we see that very much with delegated legislation; you can do that. There is no process for primary legislation.

Q60 Lord MacGregor of Pulham Market: Mr Clancy, in your written evidence, the Law Society of Scotland says, "More draft legislation should be self-contained, and there should be more consolidation measures bringing together a series of statutes in a readable fashion. Finally, codification ... should be proposed". Without droning on for hours, as you put it, should there be greater emphasis on consolidating law? What are the advantages and disadvantages of amending versus consolidating law? What would be the resource implication?

Michael Clancy: I agree that there are resource issues about consolidation. The Law Commission has consolidated 200 Bills over the last 50 years. The Joint Committee on Consolidation Bills has dealt with three Bills over the last four years. There are issues about resources. There is no doubt, however, that, although consolidation is meant to bring together a number of enactments in one enactment, there has to be some amendment around the edges, because over the years original legislation becomes careworn and a bit tired at the edges. It does not keep up with modern circumstances. We need to make sure that our law is pertinent and useable today.

The Solicitors (Scotland) Act 1980 is a consolidation measure. In it, we can see traces of legislation that stretch back to the late 19th century. Since 1980, there have been something like six Acts of Parliament, both here and in Scotland, which have affected it. We are dealing with a piece of legislation that requires us to be able to read something written by a draftsman 40 years ago and something written by a draftsman last year. They are completely different styles and there is a completely different milieu for interpreting statutes today. That is one of the reasons why we are looking for fresh legislation in Scotland.

That example can be replicated hundreds of times. Mr Greenberg made a very amusing point about the Small Charitable Donations and Childcare

Payments Bill. That would be a prime object for consolidation as a small measure, because the Small Charitable Donations Act was only passed about six years ago, so it is within living memory. We could do it quite easily. Why don't we? That is something that is important for us to ask. Why not consolidate when we deal with policy development? Yes, it would take resources. The Law Commission estimates that it takes about two years to produce a consolidation measure, and it has significant resources to devote to that. It might be two years well spent if we had a moratorium on legislating on such and such an area of law with the hope of some consolidated measure in the future.

Lord MacGregor of Pulham Market: What are the resource implications for Parliament, given that most Members of Parliament are extremely stretched already?

Michael Clancy: That, of course, is a very big question. It is a very difficult situation for Members of the House of Lords in particular, who may not have staff to assist them. They may not have office space in which to sit properly, and things like that. There is a big resource issue. There is a resource issue in the other place. Trying to enlist assistance from external bodies is probably one quick way to do that, but, as you know, you get a lot of assistance from external bodies already. They issue briefings on Bills. They prepare amendments. Organisation such as ours, here at this table, charities and third-sector organisations do it as well. There is resource, in a sense, but it would have to be marshalled and ordered in a particular way.

The Chairman: Can I ask your two colleagues to be very brief in any supplementary comments they would like to make?

Robert Khan: I agree. There is an example that Andrew will know about in relation to compulsory purchase legislation. It is Victorian legislation that was amended in the 1960s. It was influenced in the 1970s and there were more influences in the 1990s. It is a total morass. It is very difficult for trained practitioners to understand, let alone their clients and members of the public. There needs to be more priority. Again, of course, we need to be realistic. No Minister ever made their reputation by saying, "I think I want to be the next Justinian and bring in more consolidation", even though perhaps they should have that aspiration.

The Chairman: That was a very good long answer.

Robert Khan: I am sorry.

The Chairman: Please, do not apologise. It was interesting to hear about Justinian, as it always would be.

Andrew Walker: I would add only this. I am not sure that the bulk of the resources are at parliamentary level. The largest part of a consolidation exercise is drawing everything together and putting it into a single document. The role for Parliament there, as much as anything, is to make sure that that exercise has been done correctly. Michael's point

is a good one about language used a long time ago being applied in modern circumstances. If a change of language is perceived to be necessary, the scrutiny needs to go to that. For that, you need people who understand the original language and how it has been transposed. It is expert outside involvement that the Committee is likely to depend on; the procedures are relatively straightforward.

Q61 Lord Beith: Can I be clear on whether parliamentary draftsmen in fact consult your organisations, and should they, or is that task left to the department and departmental lawyers?

Andrew Walker: I can answer that by saying no. Our law reform committee had one session a few years ago with parliamentary counsel to seek an interchange on the way things were drafted. My feeling was that there was so much awkwardness on the part of parliamentary counsel that its usefulness was limited. They did not really want to engage for fear that we were seen to be influencing them in some way. I think there ought to be consultation. In the example of delegated legislation, there ought to be an obligation to do it because, by and large, it is drafted by people who are not parliamentary draftsmen. That example really proves the benefits of it. If we all have the resources to be able to engage—we are not going to engage on a 350-page Bill; we might on a 20-page Bill or a 50-page Bill—we can bring some very useful insight into whether what has been drafted will work in practice or whether it is too convoluted.

Michael Clancy: I have had experience of parliamentary counsel in Scotland being present at meetings with civil servants, and the discussion was useful. My ideas were batted down by parliamentary counsel as unworkable, but it is a good way to engage properly. I was being a bit unkind. The important thing is to get parliamentary counsel's perspective on how one sees a piece of legislation working out in practice.

Robert Khan: I cannot say that in recent memory the Law Society in England and Wales has ever been consulted directly or has interacted with a parliamentary draftsman.

Q62 Lord Norton of Louth: This question is a follow-up about consultation. The Law Society of Scotland's evidence stressed the value of pre-legislative scrutiny. I suspect that would be common to all the witnesses. The question is: how far can it be taken? At the moment, it is very much the exception to the rule and it is dependent on government deciding which Bills will be subject to it. Would there be value in pre-legislative scrutiny being the norm rather than the exception, and is that feasible?

Michael Clancy: I think it is. There are examples that show how it works. Certainly Ministers will want discretion. The Irish Parliament effectively requires pre-legislative scrutiny unless there is some special reason. My colleague Nicola Whiteford, who produced some work on this for me, was able to show that there were particular rules in the Oireachtas which required that. There are pre-legislative scrutiny

provisions in Victoria in Australia, and in New Zealand, which could be useful models for us to examine more closely as we go on.

Robert Khan: I support that and agree. The Law Society would concur that it would be a very good thing if pre-legislative scrutiny were the norm rather than the exception. An associated point is that we are quite concerned in any case about the length of consultation periods that lead up to a Bill being produced. The Cabinet Office guidance used to be around 12 weeks. That has now been amended to what is "proportionate". I will give you one live example. The Government announced last week that it was going to bring in plans to raise the small claims limit for personal injury to £5,000. Whatever you think of that measure, it will have potentially huge effects on the rights of ordinary citizens. The consultation paper and impact assessment together are 200 pages long, and the consultation deadline is 6 January.

Lord Pannick: If we had a presumption of pre-legislative scrutiny, what could be the possible exceptions, other than urgency or simplicity? Could there be any other reason, if you have a presumption, not to have pre-legislative scrutiny?

The Chairman: Who would like to answer that?

Andrew Walker: It is difficult to think of one. I agree. I would ask you to think for a moment about what you mean by pre-legislative scrutiny. There is the policy formulation stage and then there is the implementation stage; there are two aspects to pre-legislative scrutiny. I am not sure that the current system allows for clear distinction of the two.

Lord Pannick: I am thinking of a draft Bill on which people consult, on policy and on the terms.

Andrew Walker: I cannot immediately think of one.

The Chairman: Time is limited, I am afraid, but would you like to unburden yourselves of any points we have not asked you about? There are a few moments we can spare for that.

Michael Clancy: I am very happy, Lord Chairman. I think we have covered everything. You asked at the start what our members tell us. Of course, our members tell us through our sub-committees and committees where they see difficulties. It is not just our members; people in Parliament, judges and a whole host of agencies are able to comment on the quality of legislation, and they do so. We have to be sensitive to the fact that it is not simply those people who have a particular interest. This is a matter which is for all the people. We have to reassess and reposition ourselves to make sure that, when we are making legislation, it is not for the benefit of the lawyers or industry but for the benefit of the people of this country who elect individuals to sit in Parliament and make law.

The Chairman: I would very much have liked to have time to ask you—but it would have excluded the other two—whether there were any

lessons to be learned from procedures, shortcomings or high-quality performance activities in the processing of legislation in the Scottish Parliament. I am not asking you to answer now. Perhaps you would take it away, think about it and write to the Committee.

Michael Clancy: I can certainly do that. Of course, only a couple of years ago, in 2013, the Scottish Parliament Standards, Procedures and Public Appointments Committee issued a report on this topic that you may want to mine. It covers the gamut, from pre-legislative scrutiny right the way through to the production of a Bill and Royal Assent. Yes, there will be examples that I can produce.

The Chairman: That would be extremely helpful. Mr Khan, is there anything else you would like to say?

Robert Khan: I have nothing to add, Lord Chairman.

Andrew Walker: Nothing from me either.

The Chairman: That is brilliant. You have brought us in on time. Thank you very much indeed. It has been extremely informative and I am sorry it had to be a bit compressed. That is the problem of the success of interest in the inquiry we are conducting. Your contributions will be extremely valuable when we draw up the report. Thank you very much.

Examination of witness

Sir Stephen Laws

Q63 **The Chairman:** Welcome, Sir Stephen. After 37 years of lawmaking there can be no stronger and more powerful fount of wisdom than you bring to this inquiry. You have, however, had four years of reflection since you retired, which may have changed your views in some ways. We were very interested to receive your submission entitled "What is Parliamentary Scrutiny of Legislation for?" It is of considerable value to us. We have a few questions. You were here earlier so you may have heard me asking the "good law" question. The Office of the Parliamentary Counsel described "good law" as law that is "necessary; clear; coherent; effective; and accessible". You may have had something to do with drafting that.

Sir Stephen Laws: I am afraid it was after my time.

The Chairman: Do you think legislation does now meet that criterion, or not?

Sir Stephen Laws: I said it was after my time, but it has always been the ambition that those standards should be met. In my time I thought we got close to it, certainly on Royal Assent. Sometimes the test is not always satisfied on introduction, but that is part of the process. The difficult bit about those tests is how you reconcile inconsistencies between the standards. Effectiveness is a very important standard, and sometimes it is difficult to be both effective and clear and simple. There is also the difficulty of reconciling it with the other job of the drafter, which is to draft a Bill that will pass through Parliament.

The main difficulty is knowing when you have satisfied the standards. It is very easy to sit in an armchair and say that we know what "necessary, effective and accessible" is, but we have to find some way of testing that in the real world. In my time, the office started a project with the National Archives, using some of the techniques they use for testing the quality of the legislation.gov.uk website, asking people what they thought of legislation, whether they found it easy and what they understood by it. That approach is much better than a conceptual attempt to analyse what effective and coherent is.

The Chairman: That is understood. Perhaps it will develop as we ask more specific questions.

Q64 **Lord MacLennan of Rogart:** Do you consider that external advice should be brought in, as we heard from previous witnesses? If so, who should consult and advise on the external advice?

Sir Stephen Laws: Consultation is a very important part of producing legislation at policy level. I heard it said that parliamentary drafters do not speak to the Law Society and the Bar Council. I am not sure that is quite right. When I was drafting the Finance Bill in the 1990s, I had frequent meetings with the revenue law committee of the Law Society to

talk about it, but it was also our experience that it was important for consultees to address the policy when giving their consultation.

I remember drafting privatisation Bills in the 1980s when all the parties to the sell-off were represented by firms of solicitors, and we had some very difficult meetings at which solicitors for the companies or existing corporations came along. We had long discussions that purported to be about the drafting but were in fact about the policy. It would have been much better if we had not been there so that both the department and the consultees could not divert the discussion in our direction to talk about something that was made out to be drafting when the real issue was one of policy.

Q65 Lord Pannick: If parliamentary counsel receive instructions that are obscure or incoherent, or they think that the provision they are being asked to draft conflicts with the rule of law, is it their job to raise that concern? If so, how effective are the mechanisms for doing so?

Sir Stephen Laws: I think they are very effective. If we cannot understand what people want, obviously we have to ask them. Part of the skill of the job is to try to elicit what the real intention is. I do not think there is any drafter who picks up a set of instructions, who does not think, "These instructions are hopeless and I do not think I am going to be able to do this", but eventually they work their way through it. I remember only one set of instructions that I could make no sense of at all and had to send back.

As far as the rule of law is concerned, things have changed a bit since the Human Rights Act because there is much greater concentration on the requirements of the human rights convention. The traditional approach was that, if the drafter had a problem with something and the rule of law, he would raise it with the department, and if the department was unable to resolve it, he would ask the Law Officers to raise it at the Legislation Committee meeting at which the Bill was discussed. That was normally effective. It is the way of Whitehall; people are always saying they are not going to die in a ditch about something; and they tend not to. So things change and that works. If the Law Officers raised it at the Legislation Committee usually some change would result, but it was not normally necessary to go that far.

The Chairman: Is there a hierarchy of responsibility for the quality of drafting legislation among Ministers, parliamentary counsel, departmental lawyers, drafting and policy officials in the department, or some other layer of activity?

Sir Stephen Laws: Everybody is involved in the process.

The Chairman: The danger of that is that everybody is responsible, and therefore nobody is.

Sir Stephen Laws: Everybody has different perspectives. The particular perspective of the drafter is the effect on the system as a whole, because every time you introduce a piece of legislation you affect the whole

system. The constant fear of the drafter is that you will throw out the baby with the bathwater, or cause an unintended consequence that fundamentally prejudices the system. That is the main responsibility of the drafters, as well as getting the words to have the effect the department wants for them.

- Q66 **Lord Morgan:** The purpose is to make and draft good law. There has been a particular debate lately about the extent to which that is affected, or obstructed, by political pressures. There was much debate about it during the period of coalition government when there were different, perhaps conflicting, pressures within the Government between Lib Dem and Conservative Ministers, for example on Lords reform. How far is that a factor that complicates, or perhaps diminishes, the quality of good law?

Sir Stephen Laws: We would not legislate at all if it was not for political factors. Legislation is there most of the time in order to implement government policy. So part of the exercise is designed to produce good law while reconciling it with the political needs of the day—to draft a Bill that will “pass as razors war made to sell”, as one of my predecessors said.

The main point I noticed in relation to the coalition Government was an issue that is quite often technical when there is a single-party Government. That is how much you ratchet a change. When you make a change, how far do you make it impossible to turn it back? That became quite an intense political issue, because if one part of the coalition wanted something very much, and wanted it to stick, they wanted it to be ratcheted so that it could not be turned back: so people were forced to follow through with the change. The other side of the coalition, which might have thought, “We are happy to go along with the idea. We are not sure it will work, but we can change it back if it turns out that it does not”, would want a change that was not ratcheted and enabled things to go on in the same way as they had been going on, if need be. That was quite a difficult element in drafting legislation in that period.

I do not think there was much pressure to fudge things. I have always said there is no such thing as an ambiguous statute; there is only a statute that you have to litigate to the Supreme Court in order to find out what it means. Fudging things just results in a delegation of the decision to the courts, and I do not think there was an extra desire to do that.

Lord Morgan: I suppose an alternative to fudging is producing legislation that anticipates, or perhaps even invites, amendment. For example, in this House it is presented as an imperfect sample of what is proposed.

Sir Stephen Laws: I did not come across that.

Lord Morgan: I was thinking of the Trade Union Bill, for example, which anticipated amendment in the House of Lords.

Sir Stephen Laws: Governments sometimes expect amendments. I have never been asked to draft something in the belief that it would invite a change later on. I sometimes predicted that something would be

changed later on because it was not the sort of thing that would go down well in a particular House, and would be told, "We will try it anyway"; but I have never been asked to draft it in that way. There is a great risk in doing so, because the things you introduce in the hope that someone will overturn them may well not get overturned.

Q67 Lord Beith: A significant part of many Bills is amendments introducing new material brought in either by the Government or in response to other elements in the House. What is the engagement of parliamentary counsel with that amendment process and, therefore, with the final wording of what might be 20% of the Bill?

Sir Stephen Laws: It is complete. We draft all government amendments. Few Bills are amended, if they are amended, without the amendments that are eventually made being drafted by the Government. As well as drafting, we provide a handling service; we are in discussion with the department all the time about when the Bill will be amended and how, and so on.

Lord Beith: It is also changing or bringing into format amendments from other quarters in the House. It is not just the departmental noise; it is you, is it?

Sir Stephen Laws: Yes.

Q68 Lord Norton of Louth: I asked Daniel Greenberg earlier about the relationship between parliamentary counsel and the Leader of the House, as chair of the Parliamentary Business and Legislation Committee, and the problems arising, if they are not a heavyweight, in dealing with some of the big beasts in the Cabinet. How do parliamentary counsel see the Leader of the House? Is he or she seen as the voice of parliamentary counsel in relation to the Cabinet?

Sir Stephen Laws: The relationship is not wholly about the Leader of the House being chairman of the Legislation Committee, because since 2010 the First Parliamentary Counsel has been head of the Government in Parliament group in the Cabinet Office. The Leaders and Chief Whips of both Houses see First Parliamentary Counsel as their permanent secretary, so there is a much closer relationship. I do not recognise "not a big beast". To suggest that the Leader of the House and the Chief Whip are not big beasts is unfair. Their influence on government policy depends on how difficult parliamentary handling is. If you are a technician in government raising technical problems and talking about technical risks, you expect to be taken seriously—and in my experience, you always are—but you also expect to be asked to solve the problems and minimise the risks, and that happens too.

Lord Norton of Louth: When Sir Richard Mottram gave evidence, he said there could be some very big figures in Cabinet who try to steamroller their Bills through.

Sir Stephen Laws: Policy is always the driver for all legislation, and it is other Ministers who are responsible for the policy. That can happen, but I never thought that it required me to abandon all our standards.

Lord Norton of Louth: You would regard the relationship particularly between the Leader of the House and parliamentary counsel as appropriate; indeed, it has probably strengthened as a result of the changes that have taken place.

Sir Stephen Laws: Yes.

- Q69 **Lord Pannick:** Sir Richard Mottram also told us there had been a change in the working relationship, and that parliamentary counsel used to be a much more austere and distant body, whereas the modern tendency is for parliamentary counsel to work together with officials to produce the legislation. Is that your experience? In addition, might there be virtue in distance, by which I mean that a closer working relationship may have diminished the capacity of parliamentary counsel to act as an independent constraint, to encourage higher-quality legislation?

Sir Stephen Laws: I do not think it has. The change has certainly taken place. Colin Tapper wrote a book in which he described parliamentary counsel as having an enviable reputation for technical accuracy and an unenviable one for hubris. I do not think that is the case anymore. We all recognise that it is a team game. I say “we”, but I suppose it is now “they”. They also know that what they bring to the process is an independent perspective. There is always a question about when parliamentary counsel should get involved in drafting a Bill. If you get involved too early, you can be signed up and captured by the department to their view of the policy, and you should avoid that. On the other hand, if you get involved too late, you are asking them to change things at a point when they are very reluctant to do it. It depends very much on the Bill, but I do not think people lose their independent perspective; they know that is what they add to the process.

- Q70 **Lord Hunt of Wirral:** In your experience, to what extent was there pressure from Ministers to get outside external counsel to draft legislation? I recall that when Tony Newton chaired the Legislation Committee we were told there was huge resistance by parliamentary counsel to any attempt—because there was a fear of privatising the department—to ask anyone outside to draft a Bill. In the end, I think the Treasury, who were pressing it, were told, “Well, you get someone to draft the Finance Bill”, and it was an utter disaster, as it was intended to be. Why was there such resistance to outside influence?

Sir Stephen Laws: I am not sure there was resistance. Some people thought it would be a jolly good idea to be privatised. I was the drafter of the 1996 Finance Bill, so I was the inside drafter who had to incorporate drafting from the outsiders. What were the things learned from that experience? First of all, it is a specialist job. We provide not only the drafting—other lawyers do drafting—but a handling service all the way through. We know more about legislation than anybody else in Whitehall,

where individuals may work on only two or three Bills, and we are practised at the business of reconciling political and legal concerns. It is also the fact that when you recruit someone to the Office of the Parliamentary Counsel you have to teach them how to think as a lawyer in a completely inside out way. Lawyers in the outside world are used to finding the line, not drawing it. They have to treat the law as a fixed point, and they move everything around it. You then have to teach people how to think of the law as the movable bit. It is a specialist trade. What you get from a central service is a cadre of people with a consistent approach; and consistency is a large part of how to achieve coherence and clarity. In principle I do not think using others is a good idea.

The experiment also showed, partly because of the amount of work that goes into the handling service, that it was a lot more expensive, so the Treasury thought. Finally, there were problems about conflict of interest, because the firms that took on the job of drafting bits of the Finance Bill were reluctant to commit themselves not to advise on the contents of the provisions they had drafted, which was what the Government required. They were not keen on drafting the bits of the Finance Bill that would give rise to extensive new business. All those problems arise, which does not mean that you cannot take comments from people outside and get some help from time to time.

Q71 Lord MacGregor of Pulham Market: On what basis do parliamentary counsel decide whether or not it is appropriate to insert delegated powers into legislation? Are there any guiding principles?

Sir Stephen Laws: The overriding guiding principle is what Parliament wants. It is a matter of policy how much you put in delegated legislation and how much you put in the Act. If you think Parliament is going to be content for the detail to be dealt with in subordinate legislation, you are happy to do it. If you think Parliament is going to insist on its being in the Bill, you try to make sure it is in the Bill.

What do parliamentary counsel do about it? They advise the department on the line they should expect both from this Committee and the Delegated Powers Committee. Jack Simson Caird and Dawn Oliver have done an interesting analysis of the jurisprudence of this Committee that gives some guidance in that respect. Parliamentary counsel advise on the current views of the Law Officers. Quite often, the Law Officers take the line that they do not want Henry VIII clauses in Bills, so you tell the department that the Law Officers are not going to like it, and that works in similar ways to the ones I have already described in relation to the rule of law.

The other thing is that you tell departments, because it is the case, is that the most difficult provisions to draft are powers that departments do not yet know how they will exercise. The invariable experience in those circumstances is that they ask for a very wide power and, however wide you make it, the one thing they want to do, when it comes to it, is the thing you are not sure falls within it. I had a particular hobbyhorse about transitional provisions. Lots of legislation is about moving the law from A

to B. People envisage B and ask you to draft it, and then they want to take a power to get from A to B. When the Bill is passed, and they then tell you the transitional provisions they want so that they can get from A to B, they may often begin to realise that C would have been much easier to get to and would not have made much difference so far as the destination was concerned. Those are the factors parliamentary counsel take into account, as well of course as our experience, because we do lots of Bills, of how the two Houses will react to a particular power.

Lord Pannick: What you have said suggests that no substantive principles apply; it is what will be acceptable. This Committee issued a response to the Strathclyde review. We said that delegated legislation had "increasingly been used to address issues of policy and principle, rather than to manage administrative and technical changes". I wonder whether parliamentary counsel and Whitehall recognise as a principled distinction that delegated legislation should not address issues of policy and principle.

Sir Stephen Laws: You know that I was an adviser to Lord Strathclyde on his report. I am having difficulty answering, because I am trying to avoid the drafter's normal thing which is, "Define policy and principle for me". All legislation is ultimately about policy. The question is: how important is the policy? I am not sure I can take it much further.

Q72 **Lord Beith:** You ended an article, with which we have been kindly provided, with the words: "It is essential that the political importance of a desired improvement in quality is established before attempts are made to change the process to produce that improvement". Was not part of the difficulty you had in answering Lord Pannick that you shied away from any sense that there should be broad principles of quality independent of the political desirability, or otherwise, of the measure being put before Parliament?

Sir Stephen Laws: The point I was making was that you cannot guarantee a good result by producing an abstractly good process. You have to decide in a political way what policy and outcome you want, in order to know whether, if you amend the process, you will get what you want.

Lord Beith: But should you not be ensuring that the process is one that protects certain principles against the rush of a desired political outcome?

Sir Stephen Laws: You need to decide first the outcome you want and then design the process to produce that outcome. I do not think you can guarantee a good outcome by designing a process that you think is a good process.

Q73 **The Chairman:** In that article, which is extremely interesting, you reminded us: "The two Houses cannot be expected to be exhaustively responsible for every aspect of legislation. Their role is that of critic, not author". It is quite clear that the role of critic is a hell of a lot easier than the role of author. You have been away for four years, and I imagine that

from time to time you pick up a Bill. Do you think, "Oh, my God. Who wrote this rubbish?" or whatever.

Sir Stephen Laws: I do not go that far.

The Chairman: Do you have any sense of a degenerative trend in the drafting of legislation, or do you think it is as good, or as bad, as it ever was?

Sir Stephen Laws: I try to resist the natural tendency of ageing to think that everything was better before. No, I do not. I am able to assume that the drafting done in the Office of the Parliamentary Counsel meets the political and legal needs of the day.

The Chairman: It comes back to the responsibility of the Government to know what they want to do.

Sir Stephen Laws: Yes.

Q74 **Lord Norton of Louth:** One of the important factors in getting the drafting right is time. How much pressure is there on parliamentary counsel from the point of view of time constraints? Are we seeing a greater trend of government rushing legislation?

Sir Stephen Laws: Not a "greater trend". I agree there is pressure of time; there always has been. I joined the office in April 1976. We had to introduce a Bill to extract pay beds from the health service and do some other things to the National Health Service within six weeks. We got the instructions just after I joined the office and we had to get the Bill in before the Whitsun recess. There has always been pressure of time, and it is one of the things you have to manage. You ask for more, and normally you do not get as much as you asked for.

Lord Norton of Louth: If you do not have the time you need, presumably that has a consequence for the quality of what you are drafting.

Sir Stephen Laws: It can affect it. The important thing is the policy analysis. Time is important. You cannot do things in a hurry. You cannot rush the process of legislation. Quite often, it is emergency legislation that goes wrong, not mainly because it has been drafted in a hurry but because it has not been given enough time to acquire the acceptance it needs to work as law. Sorry, I have lost my train of thought a bit.

Lord Norton of Louth: To follow that up, if there is not enough time, the solution is either to create more time or, presumably, expand the Office of the Parliamentary Counsel.

Sir Stephen Laws: Yes.

Lord Norton of Louth: Did you not increase the number of staff a few years ago?

Sir Stephen Laws: When I took over there were 60; when I left there were 50. It might be a bit less than 50 now, but they may be recruiting. In some ways increasing the numbers does not help a lot, because the virtue of the system is that it provides one person, with perhaps a couple of people assisting, oversight of the whole Bill. There are some Bills you can split into bits and give to different drafters, of which the Finance Bill is the classic example, but if you are to draft something that is coherent, the thing you want to bring to it is one mind that can hold it all together. You cannot just throw more people at it, because that makes it less efficient.

Lord Norton of Louth: You need more time. The number of Bills is not necessarily increasing, but the length has tended to increase, which presumably puts pressure on the individual drafting a big Bill. It is an issue of making sure they have adequate time to draft the Bill.

Sir Stephen Laws: Yes.

The Chairman: Time is our enemy, but we will let Lord Judge have the last question.

Q75 **Lord Judge:** Going back to delegated legislation and the principles that are going to be applied, I am slightly alarmed and want to give you a chance to take this further. I had the impression from what you said that whether a piece of delegated legislation was provided for depended on whether or not it was thought that Parliament, and then the Law Officers, would wear it. Can you expand that, please?

Sir Stephen Laws: It is similar to what you put in a schedule. You make the decision on the basis that there will be some things that Parliament will want to subject to the full range of scrutiny that it applies to a parliamentary Bill. There are some things that Parliament will be content to see approved by statutory instrument. That is the basis on which you decide what goes in the clause and what goes in the schedules; that is the basis on which you decide whether or not it would be acceptable to make a particular topic the subject of subordinate legislation. There can be no other, because what you are deciding is how much scrutiny the particular proposition will be subjected to by Parliament, and Parliament ought to have control of that.

The Chairman: It has been a fascinating session, Sir Stephen. We are extremely grateful to you. We shall study with great care every answer you have given us, and I am sure we shall find the seeds of enormous amounts of wisdom within them. Thank you very much indeed.